(1989) 05 CAL CK 0002

Calcutta High Court

Case No: S. M. A. No. 73 of 1969

Radhika Ranjan Roy		APPELLANT
	Vs	
Satyendra Kumar Sarkar		RESPONDENT

Date of Decision: May 16, 1989

Acts Referred:

- Bengal Money Lenders Act, 1940 - Section 19, 36, 37A, 38, 40
- Evidence Act, 1872 - Section 92
- Transfer of Property Act, 1882 - Section 5(c), 58(c)

Citation: 94 CWN 49

Hon'ble Judges: J.N. Hore, J

Bench: Single Bench

Advocate: Swadesh Ranjan Bhunia, for the Appellant;

Final Decision: Allowed

Judgement

J.N. Hore, J.

This appeal is directed against the decision of the learned Additional Subordinate Judge, Balurghat dated 29.11.68 in Misc. Appeal No. 8 of 1968 affirming that of the learned Munsif, Raigunge dated 18.3.68 in Misc. case No. 43 of 1966. The aforesaid Misc. case arose out of an application filed by the petitioner/respondent under Sections 37A and 38 of the Bengal Money Lenders Act for a declaration of the amount of money payable by the petitioner to the opposite party. The petitioner''s case was as follows O.P. No. 1 Radhika Ranjan Roy carried on money lending business through O.P. No. 2 Alimuddin. As he had no money lending licence, he used to take sale deeds from borrowers for double the amount of loan advanced upon stipulation that on repayment of such loan the land would be reconvened to the borrower. The petitioner borrowed Rs. 3oo/- from O.P. No. 1 through O.P. No. 2 and executed an ostensible sale deed for Rs. 6oo/-. It was agreed that the opposite party would recovery the property when the loan with interest would be repaid. The

transaction was really a mortgage by conditional sale and the petitioner was in possession of the land. The petitioner paid in all Rs. 275/- towards the principal and requested the OPs to take the outstanding amount of loan with interest and to recovery the mortgaged land. O.P. No. 1 contested the case by filing a written objection in which the material allegations were denied. His case was that he collected some money to purchase land and when the petitioner was in need of money and wanted to sell the disputed land, he purchased the same for Rs. 6oo/- which was the highest market price under a registered kobala dated 5th Asar, 1369 B. S. The transaction was and out and out sale and not a mortgage by conditional sale as alleged. After purchase OP No. 1 had been in possession of the disputed land all along. The agreement for reconveyance was denied.

2. The learned Munsif held that OP No. 1 was a money lender and that the transaction was a mortgage by conditional sale. He also accepted the plea of payment of the petitioner and directed the petitioner to pay Rs. 25/- only towards principal and Rs. 25/- as interest to OP No. 1. The appeal preferred by the OP No. 1 was dismissed affirming the finding and the order of the learned Munsif. Being aggrieved OP No. 1 has preferred the present 2nd appeal.

3. The first point that has been raised by Mr. Bhunia, learned Advocate for the appellant, is that the disputed transaction was before Section 37A of the West Bengal Money Lenders Act came into operation and as such Section 37A has no application in this case. Section 37A has been inserted in the West Bengal Money Lenders Act and it came into force in October, 1965. Mr. Bhunia has contended that Section 37A has no retrospective operation and the provisions of the section will be attracted only in respect of loans contracted after October 15, 1965 when that section came into operation.

4. Section 37A is in the following terms :"Where any loan is secured by a mortgage and the mortgagor ostensibly sells his mortgaged property on any of the conditions specified in sub-sections of Section 58(c) of the Transfer of Property Act, then notwithstanding anything to the contrary contained in the proviso to the said sub-section, the transaction shall always be deemed to be a mortgage by conditional sale for the purpose of the said sub-section". The word always is significant. It clearly indicates that the intention of the legislature was to make the section retrospective. Mr. Bhunia has contended that Section 9 of the Amending Act says "shall be inserted" and not "shall be deemed to have always been inserted" and as such the section is prospective and not retrospective. According to him, the word "always" in the body of the section means always after the amendment comes into force on 15th October, 1965 In that case the word ''always'' becomes redundant. If Section 37A was meant to be prospective only the section would then have read "shall be deemed to be a mortgage by conditional sale". The use of the word ''always'' in this context clearly means always in point of time irrespective of the date of transaction. Mr. Bhunia argues that if retrospective operation were really

intended, the legislature would have said that the transaction shall be deemed to have been always a mortgage and the amending Section 19 would have said would be deemed to have been always inserted That would have, no doubt, given a clearer meaning, but even though those words are not there, the addition of the word ''always'' can have no other meaning. The only purpose for using the word ''always'' is to make the section retrospective in operation. I am, therefore, of the opinion that Section 37A is retrospective in operation. I am supported in this view by a Single Bench decision of this court in the unreported case of Ramcharan Sau v. Tarak Nath Coomar (appeal from appellate decree No. 1550 of 1960) decided on 10.6.66, R. N. Dutta, 3. has held that Section 37A of the Bengal Money Lenders Act has retrospective operation. This view was reiterated by the learned Judge in a subsequent case reported in Abdul Rahim and Others Vs. Kamalapati Mukherjee,

5. The second branch of argument of Mr. Bhunia is that Section 40(6) of the Bengal Money Lenders Act applies only when the terms of the document create or witness a loan transaction. Section 40(6) of the Bengal Money Lenders Act, 1940 is in the following terms :

Notwithstanding anything contained in the Indian Evidence Act, 1872, (I of 1872), evidence adduced by a borrower in a suit to which this Act applies or a suit brought by a borrower for relief u/s 36 or in any criminal proceedings u/s 41 or Section 42, of any oral agreement or statement contradicting, varying, adding to or subtracting from the terms of any document creating or witnessing a loan shall be admitted". Sub-section (6) of Section 40 over rides the operation of Section 92 of the Evidence Act in a suit under the Bengal Money Lenders Act, 1940. The effect of the said sub-section is that in a suit governed by the Act of 1940, the borrower may adduce any oral evidence of any agreement, statement, contradicting, varying adding to or subtracting from the terms of any document witnessing a loan. Relying upon the words "document creating or witnessing a loan" in Section 40(6), Mr. Bhunia has contended that one of the prerequisite conditions for invoking concession of sub-section(6) is that the document itself must create or witness a loan. In other words, unless the term of the document itself creates a transaction of loan, oral evidence cannot be adduced of any agreement, statement, contradicting, varying, adding to or subtracting from the terms of any document. In the instant case the terms of the impugned document are those of and out an out sale. It is an ostensible sale deed. According to Mr. Bhunia, oral evidence ought not to have been allowed to prove that the transaction was really a loan transaction or a mortgage by conditional sale. I am unable to accept the contention of Mr. Bhunia. If the document itself creates a loan or mortgage then there is no necessity for oral evidence to prove that the transaction was in essence a loan or a mortgage. If the contention of Mr. Bhunia is accepted then the very purpose of Section 37A and Section 40(6) would be frustrated. Even u/s 5(c) of the Transfer of Property Act where the mortgagor ostensibly sells the mortgaged property on condition that on payment of mortgage money the buyer shall transfer the property to the seller, the

transaction is a mortgage by conditional sale. The proviso to Section 58(c) lays down that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the same. Section 37A overrides the proviso. So, the condition of reconveyance on payment of the loan and interest may be contained in another document or it may be an oral agreement. The words "document creating or. witnessing a loan" occurring in sub-section (6) of Section 40 really suggest that it must be established by evidence that the document in essence evinces a loan transaction. Once this is proved oral evidence of agreement or statement contradicting, varying, adding to or subtracting thereof is admissible.

6. Mr. Bhunia has referred to a Single Bench decision of this court in Smt. Swarnalata Tat Vs. Chandi Charan Dey and Another, in support of his contention. The relevant part of the judgment in paragraph 13 on which Mr. Bhunia relies is as follows

Sub section (6) of Section 40 may not come to the rescue of the plaintiff unless it can be established that the impugned document creates or witnesses a loan. The borrower must satisfy firstly that the Bengal Money Lenders Act applies to the suit and secondly the document is satisfied in this case". This does not in my opinion support the contention of Mr. Bhunia. What has been held is that the seller must establish that the document really creates or witnesses a loan but in that case he failed to establish by evidence that the impugned document evinced a loan transaction. His Lordship held that the impugned transaction was an out and out sale on the ground that there was no intrinsic evidence as to the relationship of debtor and creditor and agreement of retransfer and the oral evidence failed to prove that there was any intention to create any mortgage. The evidence, both oral and documentary, failed to establish that the transaction was a mortgage by conditional sale. It has not been laid down as a principle of law that oral evidence cannot be permitted unless the terms of the document themselves create or witness a loan.

7. The last point that has been raised by Mr. Bhunia is that the findings of both the courts below that the appellant advanced a loan of Rs. 3oo/- to the respondent and there was oral agreement that on repayment of the loan with interest the appellant would reconvey the property to the respondent, that the respondent paid in all Rs. 275/- towards principal and that the transaction was in reality a mortgage by conditional sale, suffer from serious legal infirmities being based on consideration of irrelevant matter, non-consideration of relevant and important evidence and indulgence in conjectures. and surmises and this can, therefore, be challenged in the second appeal. This contention of Mr. Bhurma has considerable force. It appears that both the courts below were greatly influenced by the evidence of some other transactions between the appellant and third parties with which the present transaction has no connection whatsoever and found those transactions to be

mortgage by conditional sale and that the appellant was a money lender without licence. This is entirely irrelevant.

8. The impugned deed purports to be and out an out sale. It does not establish any relationship of any debtor and creditor. There is no stipulation of payment of interest nor there is any stipulation for retransfer. There was no separate Ekrarnama containing stipulation for reconveyance on payment of the consideration. So, the intrinsic evidence does not support the respondent''s case. With regard to the oral evidence, the courts below heavily relied upon the testimony of Alimuddin alleged to be the agent of Radhika Ranjan Roy who carried out the negotiation on behalf of Radhika. Alimuddin was impleded as opposite no. 2. He appeared through an Advocate, filed a Vokalatnama and asked for time to file written objection. Though he denied this fact in his evidence he was constrained to admit his signature in the Vokalatnama. He did not file any written objection supporting the petitioner''s case. On the other hand, initially he wanted to contest the petition and wanted time for filing written objection. Ultimately, he came to support the petitioner''s case entirely at the time of trial. That he had scanty respect for truth would appear from his attempt, though an unsuccessful one, to suppress the simple fact that he appeared through an Advocate and filed a petition for time to file objection. The courts below ignored the possibility of this witness being gained over. Moreover, Radhika Ranjan Roy (DW4) has specifically stated that Alimuddin does not look after his property and he is not his agent. This statement has not been challenged in the cross-examination. In these circumstances, the courts below were in error in relying upon the evidence of Alimuddin without corroboration as ah independent witness.

9. One of the tests to ascertain whether the transaction is a sale or a mortgage is the quantum of consideration. If the price is much below the real value of the property it would indicate mortgage. If the price is adequate it would indicate sale. The lower appellate court relying upon some sale deeds (Ext. 1 series) has held that the value of the land was about Rs. 4oo/- per bigha. The consideration of Rs. 6oo/- for 90 decimals of land was according to the lower appellate court grossly inadequate. The lower appellate court did not consider whether the kinds covered by Ext. 1 series were of the same quality. The position, distance and the nature of the lands were not also taken into account. Moreover, a very important fact has been overlooked by the lower appellate court as well as by the trial court. The petitioner Satyendra Kumar Sarkar has clearly admitted in his evidence that the suit land was under barga cultivation at the time of the transfer. A land in possession of a bargadar must fetch a much lesser price. Both the courts also omitted to consider the admitted fact that Satyen purchased 68 decimals of danga land on the same date for Rs. 7oo/-, in fact, both the documents were created at the same time. Admittedly, part of the suit land is full of jungle. There is also evidence that the land purchased by Satyen on the same day was much better in quality than the disputed land. It is also an admitted fact that there are cosharers in respect of the said land purchased by Satyen. There is no bargadar on that land. If these facts are taken into consideration it cannot be

said that the consideration was too inadequate. Both the courts below committed error in not taking into consideration these relevant and important facts. Moreover, it is clear that the petitioners required the money to acquire another property and not for any other pressing need. A better property free from bargadar was purchased with almost the same consideration.

10. Possession is a very important test to determine whether the transaction is a sale or mortgage. If the transferor continued to be in possession it would strongly suggest mortgage but if possession was parted with, it would clearly indicate sale. Admittedly, the transferee Radhika Ranjan Roy is in possession of the disputed land. The petitioner came with the story at the time of the trial that Radhika Ranjan Roy forcibly dispossessed him after institution of this case. Both the courts below have accepted this story and held that Satyen continued to be in possession even after the transfer and he was dispossessed after the institution of the Misc. Case. Dely in filing written objection by Radhika was considered to be a circumstance supporting the petitioner''s case that the petitioner was dispossessed after institution of the Misc. case. This is a wild conjecture. It is significant that the petitioners did not amend the petition or even inform the court about the alleged dispossession after the institution of the Misc. Case. The evidence of the DWs. has been disbelieved mainly on the ground that there is no averment in the written objection as to how Radhika possessed the disputed land in 1370 B.S. This is matter of evidence and it need not be pleaded in detail. Moreover, in paragraphs 10 and 11 of the written objection the details as to how Radhika possessed the disputed land after his purchase have been specifically pleaded. The lower appellate court disbelieved the testimony of DWs. on flimsy grounds. It has also overlooked the fact that PW3 Kancha Pahan, the alleged bargadar of Satyen, has not stated about cultivation by him after the date of transfer. He, has made a vague statement that he cultivated the disputed land for 10/12 years. According to Satyen PWs cultivated the land at least 7/8 years from before the Kobala.

11. Regarding the alleged repayment of loan to the extent of Rs. 27 5/-not a scrap of paper was produced by the petitioner in support of the same. According to Satyen none else except Alimuddin knows the fact of repayment. It is quite improbable that Satyen would not insist on receipt or that he would not take any independent witness at the time of the alleged payment. The testimony of Alimuddin ought not to have been relied on without corroboration from any independent source. The above would show that the findings of the courts below were partly based on summaries and conjecture, partly on irrelevant matter and non-consideration of relevant and important evidence. The findings are perverse and cannot be upheld. In the result, the appeal is allowed with costs and the judgments and orders of the courts below are set aside. The Misc. case stands dismissed on contest with costs, the hearing fee in the Misc. case being assessed at Rs. 32/-.